

**United States Department of Labor
Employees' Compensation Appeals Board**

M.C., Appellant

and

**DEPARTMENT OF THE AIR FORCE,
MAINTENANCE DEPARTMENT, TINKER
AIR FORCE BASE, OK, Employer**

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**Docket No. 07-1443
Issued: October 12, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 7, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 29, 2007 merit decision denying his request for authorization of back surgery. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly denied appellant's request for authorization of lumbar fusion surgery.

FACTUAL HISTORY

On March 24, 2006 appellant, then a 54-year-old tool and parts attendant, filed a claim (file number 16-2111508) alleging that on February 19, 2006 his back "clenched and froze up"

while straightening up from sitting and he felt back pain, stiffness and soreness.¹ He stopped work on April 2, 2006. The Office accepted that appellant sustained a lumbar sprain.²

The findings of a March 28, 2006 magnetic resonance imaging (MRI) scan of appellant's low back showed degenerative changes producing stenosis at L3-4 and L4-5, more prominent at L3-4, narrowing of neural foramina between L1-2 and L5-S1 and eccentric annular bulges at L1-2 and L2-3.

On August 7, 2006 Dr. Jeffrey F. Nees, a Board-certified orthopedic surgeon, indicated that he was examining appellant for the first time and provided a history of January 2000 and February 2006 employment injuries.³ He detailed the findings of appellant's recent MRI scan testing and recommended that he undergo a discogram at L2-3, L3-4, L4-5 and L5-S1. On August 28, 2006 appellant underwent a provocative discogram and was diagnosed with severely degenerative, severely painful L2-3, L3-4, L4-5 and L5-S1 discs which each produced concordant low back and right buttock pain at low intradiscal pressurization.

On August 29, 2006 Dr. Ness indicated that the August 28, 2006 discogram showed that the L2-3, L3-4, L4-5 and L5-S1 discs produced concordant back and right buttock pain. He stated:

"It was discussed with the patient that with four bad discs, our statistical odds of helping the patient are very poor. [Appellant] asked if we could do the two lowest levels which were the most concordant pain generators and I told him that we could, but I still would n[o]t give that operation any better than about 50/50 odds that it would help him because we would largely be ignoring two other pain generating discs higher in the spine. He seemed to be willing to undertake this surgery with these odds, but his wife seemed very reluctant. I asked them to talk it over and get back with us about how they [woul]d like to proceed. The only other option for him is referral for pain management.

In a surgery authorization form dated September 21, 2006, Dr Nees' office submitted a request, on appellant's behalf, for the Office to authorize two-level fusion surgery with instrumentation at the L4-5 and L5-S1 levels.

On September 26, 2006 Dr. Ronald Blum, a Board-certified orthopedic surgeon serving as an Office district medical director, considered whether the requested surgery should be authorized. He stated that the diagnosis for appellant's work-related condition should be

¹ Appellant started working as a tool and parts attendant on February 6, 2006 and asserted that this limited-duty position required bending, stooping and standing in contravention of his restrictions.

² The Office had previously accepted (under file number 16-349412) that appellant, then working as a sheet metal mechanic, sustained a lumbar sprain, open back wound without complications, right hand sprain and "sprain of other specified sites" on January 31, 2000. Appellant asserted that his problems on February 19, 2006 constituted a recurrence of disability due to the January 31, 2000 injury, but the Office interpreted his claim as a claim for a new injury on February 19, 2006. The file numbers 16-349412 and 16-2111508 have been combined in the current file.

³ Dr. Nees referred to the injuries as occurring on January 1, 2000 and February 17, 2006 rather than January 31, 2000 and February 19, 2006.

upgraded to include aggravation of lumbar degenerative disc disease⁴ and noted that the “necessity for the recommended procedure is related to the accepted work-related injury.” Dr. Blum stated:

“It is my opinion the information in the record does not support the performance of the recommended surgical procedure. Spine fusion for discogenic pain when there are more than two levels of demonstrated discogenic pain has such a poor prognosis for relieving pain that most would not consider spine fusion as within the realm of accepted medical practice. This creates a conflict of opinion that cannot be resolved with a record review. A second opinion is requested.

“It is my recommendation [that] the claimant be seen and evaluated by a Board-certified surgeon who is qualified to provide care for complex problems of the spine for a second opinion.”

The Office referred appellant to Dr. Christopher Jordan, a Board-certified orthopedic surgeon, for an examination and opinion on his need for two-level fusion surgery with instrumentation at the L4-5 and L5-S1 levels. On November 15, 2006 Dr. Jordan stated that appellant’s current back condition, including his decreased back motion and the degenerative findings seen on MRI scan testing, were sequelae from the accepted work injury. Regarding the necessity of the requested surgery, he stated:

“The patient quotes Dr. Nees saying that the chances of him getting complete relief are low and that even if he fuses the lower two levels, the pathology in the L2-3 and L3-4 levels are likely to cause continued symptoms. Like Dr. Blum, that leaves me wondering what the indication for surgery is. This patient would benefit from a pain management program that is psychologically based and also focuses on trunk strengthening and mobility. I also think that he would benefit from a custom-made lumbosacral orthosis for use when he is at work.... Until these two nonoperative programs are completed, I would not recommend surgery.”

In a January 29, 2007 decision, the Office denied appellant’s request for lumbar fusion surgery. The Office based its determination on the opinions of Dr. Blum and Dr. Jordan and indicated that the opinion of Dr. Nees was of limited probative value.

LEGAL PRECEDENT

Section 8103(a) of the Federal Employees’ Compensation Act states in pertinent part: “The United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation.”⁵ In order to be entitled to

⁴ The Office subsequently updated its accepted work-related conditions to include “aggravation of degeneration of lumbar or lumbosacral intervertebral disc.”

⁵ 5 U.S.C. § 8103.

reimbursement of medical expenses, appellant has the burden of establishing that the expenditures were incurred for treatment of the effects of an employment-related injury or condition.⁶ Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.⁷

Section 8123(a) of the Act provides in pertinent part: “If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”⁸ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.⁹

ANALYSIS

The Office accepted that on February 19, 2006 appellant sustained a lumbar sprain and “aggravation of degeneration of lumbar or lumbosacral intervertebral disc.”¹⁰ In September 2006, appellant requested authorization for Dr. Nees, an attending Board-certified orthopedic surgeon, to perform two-level fusion surgery with instrumentation at the L4-5 and L5-S1 levels. The Office denied appellant’s claim based on the opinions of Dr. Blum, a Board-certified orthopedic surgeon who served as an Office medical adviser, and Dr. Jordan, a Board-certified orthopedic surgeon who performed a second opinion examination.

The Board finds that there is a conflict in the medical evidence between appellant’s physician Dr. Nees and the Office’s physicians Dr. Blum and Dr. Jordan regarding the necessity of appellant’s requested fusion surgery with instrumentation at the L4-5 and L5-S1 levels.

Dr. Nees provided an opinion that appellant should undergo surgery related to his accepted work injuries, *i.e.*, two-level fusion surgery with instrumentation at the L4-5 and L5-S1 levels. Although he acknowledged that appellant would not get complete relief from back pain after this surgery, he provided an opinion on August 28, 2006 that the surgery had about 50/50 odds of helping him.¹¹

In contrast Dr. Blum determined on September 26, 2006 that the information in the record did not support the performance of the requested lumbar fusion surgery. He stated: “Spine fusion for discogenic pain when there are more than two levels of demonstrated discogenic pain has such a poor prognosis for relieving pain that most would not consider spine

⁶ *Bertha L. Arnold*, 38 ECAB 282, 284 (1986).

⁷ *Zane H. Cassell*, 32 ECAB 1537, 1540-41 (1981); *John E. Benton*, 15 ECAB 48, 49 (1963).

⁸ 5 U.S.C. § 8123(a).

⁹ *William C. Bush*, 40 ECAB 1064, 1975 (1989).

¹⁰ The Office had previously accepted that on January 31, 2000 appellant sustained a lumbar sprain, open back wound without complications, right hand sprain and “sprain of other specified sites.”

¹¹ Dr. Nees indicated that the degenerative condition at L2-3 and L3-4, which was not as severe as the condition at L4-5 and L5-S1, would likely continue to cause some degree of pain.

fusion as within the realm of accepted medical practice.” In addition, Dr. Jordan indicated that he agreed with Dr. Blum’s rationale for denying authorization for the requested lumbar fusion surgery and noted that he was “wondering what the indication for surgery is.”¹²

Consequently, the case must be referred to an impartial medical specialist to resolve this conflict in the medical opinion evidence regarding the necessity of appellant’s requested fusion surgery with instrumentation at the L4-5 and L5-S1 levels.¹³ On remand, the Office should refer appellant, along with the case file and the statement of accepted facts, to an appropriate specialist for an impartial medical evaluation and report including a rationalized opinion on this matter. After such further development as the Office deems necessary, the Office should issue an appropriate decision regarding appellant’s claim.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether the Office properly denied appellant’s request for authorization of lumbar fusion surgery. Due to a conflict in the medical evidence, the case is referred to the Office for further development.

¹² Dr. Jordan recommended that appellant first use an orthosis and join a pain management program which included a trunk strengthening regimen.

¹³ The Board notes that there is no requirement under the Act that a requested medical treatment cure or provide total symptomatic relief to a given claimant. The treatment could also “give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation.” See 5 U.S.C. § 8103.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' January 29, 2007 decision is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: October 12, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board